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No. 90-1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALBANY INSURANCE COMPANY,

Petitioner,

—v.—

ANH THI KIEU,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION AND BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AND MOTION FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Institute of Marine Underwriters (AIMU) hereby requests permission to file a brief *amicus curiae* in this matter. Consent of all parties has been duly requested. Petitioner and Intervenor-Respondent have consented to the filing of the attached brief. No response from Respondent has been received to requests for consent sent by mail and by telefax.

AIMU was founded in 1898 and is a national trade association of over ninety insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States. Because its member-

ship underwrites approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies in their efforts to maintain uniformity in and consistent application of the laws affecting maritime commerce and marine insurance. An issue of very special significance to AIMU and its member companies is presented in this case. The decision of the Court of Appeals for the Fifth Circuit held that the doctrine of *uberrimae fidei* is not entrenched federal precedent.

AIMU's interest in this appeal stems from its desire for uniformity and certainty in maritime law throughout the United States. The Fifth Circuit's decision that the doctrine of *uberrimae fidei* is not established federal maritime law strikes at the heart of the marine insurance business in this country, and the world, and the manner in which it is conducted. The decision of the Court of Appeals in this matter is contrary to the great weight of authority and will seriously affect the American marine insurance market.

The decision of the Appellate Court would destroy a practice and procedure centuries old with which all parties in marine insurance are familiar and to which they have adapted. The detailed case law developed over centuries, which has served as a guide to the parties, will be rendered void. In its place will come confusion, uncertainty, and extensive litigation.

The matter under review by the Court involved a misrepresentation in the procurement of a marine policy on a fishing vessel. A crisis in the availability and affordability of fishing vessel insurance was widely investigated by Congress in the 1960's and again in the mid-1980's. AIMU worked closely with the House Merchant Marine and Fisheries Committee, the Senate Merchant Marine Subcommittee, the National Marine Fisheries Service, the National Council on Fishing Vessel Safety and Insurance and the Marine Index Bureau in studying this problem and seeking solutions. The decision rendered in this case could have serious consequences with

respect to fishing vessel insurance and marine insurance in general.

A study of loss statistics on fishing vessel insurance among American marine underwriters in the early 1980's showed that, on average, losses and expenses were 166% of income for the Gulf Region and 156% nationwide. *See Insurance of Fishing Vessels: Hearings on H.R. 4407, H.R. 4415, H.R. 4465, H.R. 277 and H.R. 3156 Before the Subcomm. on Merchant Marine, the Subcomm. on Coast Guard and Navigation and the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 2d Sess. (1986) (statement of Peter J. Egan, Chairman of the AIMU Fisheries Insurance Committee). Dishonesty was one factor contributing to the staggering losses. The "moral hazard", the possibility that a vessel will be sunk, stolen or burned to claim the insured value, is one of the underlying problems associated with fishing vessel insurance. National Research Council, *Fishing Vessel Safety: Blueprint for a National Program* 138 (1991).

Misrepresentation in the procurement of insurance policies, in general, is a serious problem confronting the insurance industry. The Court's decision flies in the face of public policy of discouraging dishonesty in insurance applications. The decision ignores the unique character of marine insurance contracts and relaxes the standards by which concealment in maritime insurance is judged by doing away with the time-tested duty of utmost good faith. The decision of the Court also conflicts with the overwhelming weight of federal law and denies a primary tenet of marine insurance law adhered to by maritime nations of the world.

In filing this brief *amicus curiae*, AIMU is acting in support of the American and international marine insurance communities. Uniformity of admiralty law is the area of vital concern to AIMU. Because of the expertise developed by petitioner on issues relating to marine insurance, it would be

of assistance to the Court to hear its views on the problems presented in this case.

AIMU respectfully prays that this Honorable Court accept its brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Summary of Argument

The doctrine of *uberrimae fidei* is an established federal admiralty rule in marine insurance law, having been applied in the United States since the birth of the nation. When an established federal rule exists concerning marine insurance contracts, that rule must be applied. The Court of Appeals erred in holding that Texas law and the federal rule are similar. An analysis of that Court's opinion demonstrates that the Texas rule or rules regarding misrepresentation differ materially from the federal rule. The Petition for Writ of Certiorari should be granted.

ARGUMENT

I

THE DOCTRINE OF *UBERRIMAE FIDEI* IN MARINE INSURANCE IS THE BASIS UPON WHICH ALL MARINE INSURANCE CONTRACTS ARE MADE

The doctrine of *uberrimae fidei* is the premise upon which all marine insurance contracts are based. The marine underwriter, in deciding to accept a risk, the premium to be charged, and the terms and conditions of coverage, relies upon this rule of law known to all maritime brokers and underwriters. The assured and the broker must advise the underwriter of all facts in their knowledge material to the risk to be insured. Given the perilous and far flung environments in which the subjects of marine insurance function, the varieties of cargoes and ships with their particular, and sometimes unique attributes and characteristics, it is difficult to imagine underwriters functioning without the doctrine of *uberrimae fidei*. The terms, conditions of coverage, and premiums to be charged are established by underwriters based upon the information presented to them concerning a product or vessel and the particular characteristics of the trade involved. Without the rule of *uberrimae fidei*, or complete disclosure, the practice in the field of marine underwriting would change drastically. Marine underwriters would have no recourse but to set stringent terms and conditions in their policies and increase premiums in an attempt to place themselves on some sort of equal footing in dealing with insureds with respect to knowledge of the relevant facts regarding a risk.

II

THE DOCTRINE OF *UBERRIMAE FIDEI* IS AN ESTABLISHED FEDERAL ADMIRALTY RULE IN MARINE INSURANCE LAW

In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), the United States Supreme Court held that in

determining what law was applicable in deciding cases involving marine insurance contracts, the first step was to determine whether there was a judicially established federal admiralty rule governing the issues involved. If an established federal rule existed, it was to be applied.

In *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), the Court further elaborated on this point, stating at 742:

> Nor is *Wilburn Boat Co. v. Fireman's Ins. Co.*, 348 U.S. 310, apposite. The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented.

The doctrine of *uberrimae fidei*, as applied to marine insurance, is hundreds of years old and applied in both the United States and England.

In the United States, a few of the authorities applying the rule are *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828); *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485 (1882); two Fifth Circuit decisions, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) and *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969); and Appellate and District Courts' decisions from many other Circuits, i.e., *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2d Cir. 1985); *Albany Ins. Co. v. Wisniewski*, 579 F. Supp. 1004 (D.R.I. 1984); *Hartford Ins. Co. v. Garvey*, 1989 A.M.C.[1] 652 (N.D. Cal. 1988); *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689 (11th Cir. 1984), have expressly stated that the *uberrimae fidei* federal maritime rule was the basis upon which the cases were decided. The decisions above cover a span of over 160 years.

It is submitted that a doctrine applied for more than 160 years by our courts is an established federal admiralty rule. The decision in *McLanahan*, *supra*, with its citation to prior

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1 American Maritime Cases not officially reported.

authorities, makes it evident that the *uberrimae fidei* doctrine is one as old as the country itself.

III

THE PANEL'S DECISION IS ERRONEOUS IN HOLDING THAT TEXAS LAW AND THE FEDERAL RULE ARE BASICALLY SIMILAR

The Court of Appeals discussed the factors which should be examined in determining whether to apply federal maritime law or state law. Opinion, pp. 3162-64.[2] One of the factors to be considered is any material difference between state law and federal law on the subject.

> State insurance law generally should not govern marine insurance disputes if it is materially different from federal maritime law. (Opinion, p. 3163).

The Court then set out two inconsistent versions of the Texas rule.

At page 3163, it stated:

> Under Texas law, an assured's misrepresentations may invalidate the policy of insurance, ***but only if the misrepresentations contributed to the destruction of the insured property***. Tex. Ins. Code Ann. art. 21.16[3] (Vernon 1981). Texas law, unlike federal law, imposes an appropriate limitation that relatively minor misstatements which have no causal connection with the destruction of the property do not afford an excuse for

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2 The relevancy and basis for the factors listed is questionable. The Supreme Court in *Wilburn* simply stated that if an established federal rule exists, it was to be applied. No additional factors were discussed.

3 It is highly questionable that this is an accurate expression of Texas law. The Court in *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631, 644 (5th Cir. 1962), discussed the identical section, quoted the exact section, and reached an opposite conclusion. A reading of section 21.6 shows that as regards a misrepresentation, materiality, not causality, is the determining factor.

> non-payment. The fundamental nature of both laws, however, is the same.

(emphasis added).

Five pages later in its Opinion, the Court sets out a Texas rule with respect to misrepresentations based upon materiality as opposed to causality and adds to the insurer's burden a *scienter* requirement, tantamount to proof of civil fraud.

> Under Texas insurance law, an insurer may invalidate a policy of insurance on the basis of the insured's misrepresentations in the insurance application only if the insurer can successfully plead and prove the following five elements: (1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) ***the intent to deceive on the part of the insured in making same***; and (5) the materiality of the representation. The unique aspect of this Texas law is the requirement that the insurer plead and prove the insured's intent to deceive.

Opinion, p. 3168. (emphasis added; citations omitted).

In *Gulfstream Cargo*, *supra*, at 981 n.20, the maritime rule is stated:

> In marine insurance, contrary to the general rule applicable to other kinds of insurance discussed . . . any omission to communicate a material fact which insured is under an obligation to disclose will vitiate the policy whether such omission is intentional or results from mistake, accident, forgetfulness, or inadvertence; and fraud is not necessary. . . . All facts are material which would affect the mind of a rational underwriter, governing himself by the principles on which underwriters in practice act, as to either of the following points: 1st, whether he will take the risk at all; 2nd, at what premium will he take it. The duty attaches at the time of effecting the insurance, * * * for the effect of a concealment in avoiding the policy is to be determined not by its eventual relation to the nature of the risk, but

> with reference to its immediate influence on the judgment of the underwriter.

(citations omitted)

It is submitted that a simple reading of the two rules demonstrates that either or both "versions" of the Texas law recited by the Fifth Circuit differ materially from the federal law on concealment in marine insurance contracts. No expression of the federal law requires a marine underwriter to prove causality or *scienter* with respect to non-disclosure of material facts.

Hence, the Fifth Circuit's decision is contrary to one of the factors it listed.

The Circuit Court additionally erred at page 3165 when it stated, in reference to *Fireman's Fund Ins. Co. v. Wilburn Boat Co.*, 300 F.2d 631 (5th Cir. 1962) and *Gulfstream Cargo, supra*:

> Each of these cases has declined, however, to enforce the strict *uberrimae fidei* rule as the basis for the invalidation of a marine insurance policy.

This statement is not accurate. As stated in *Gulfstream Cargo, supra*, at 981:

> With much ground for echoing the Court's [*Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)] conclusion there expressed, that the maritime law, not the state law, would control on the issue of concealment, see 300 F.2d at 647 n. 12, we again find it **unnecessary** to resolve the point further. Of Florida we can say what we there said of Texas. 'Although we have found no Texas case expressly applying this rule, **there is no indication that the Texas courts have departed from this firmly established principle of marine insurance.**' 300 F.2d at 647.

(emphasis added)

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted in this matter.

The doctrine of *uberrimae fidei* is a time honored, firmly established component of federal maritime law.

The Circuit Court's decision, if allowed to stand, will cause substantial disruption in the marine insurance business which will be to the detriment of both insureds and insurers. The result will be the destruction of the basis under which the industry has functioned for hundreds of years. As the insurers and their customers seek to develop new concepts to address the problems created by this decision, there will, of necessity, be increased confusion and misunderstanding, resulting in needless litigation as the parties seek to reestablish some workable framework in which to proceed.

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